

ENVIRONMENTAL PROTECTION AGENCY

[EPA-HQ-OAR-2009-0430; FRL ]

Notice of Data Availability Concerning Compliance  
Supplement Pool Allowance Allocations under the Clean Air  
Interstate Rule Federal Implementation Plan.

AGENCY: Environmental Protection Agency (EPA)

ACTION: Notice of data availability (NODA)

SUMMARY: EPA is administering -- under the Clean Air  
Interstate Rule (CAIR) Federal Implementation Plans (FIPs)  
-- the CAIR NO<sub>x</sub> Annual Trading Program Compliance Supplement  
Pool (CAIR CSP) for the States of Delaware, Louisiana,  
Maryland, Pennsylvania, and Wisconsin. The CAIR FIPs  
require the Administrator to determine by order the CAIR  
CSP allowance allocations for units in these States that  
requested and qualify for these allocations and to provide  
the public with the opportunity to object to the allocation  
determinations. In this Notice of Data Availability  
(NODA), EPA is making available, to the public, data and  
other information relating to the CAIR CSP allowance  
allocations and denial of allocations to individual units  
whose owners and operators requested such an allocation  
from EPA. The allocations and denial of allocations are  
based on each unit's emissions data reported to EPA in

quarterly emissions reports submitted by the unit's owners and operators under the CAIR trading program and other programs and on EPA's interpretations of the regulation governing the allocation of CAIR CSP allowances. The NODA presents the emissions data and other information, including the CAIR CSP allowance allocation calculations for each individual unit and the resulting allocation for each unit.

**DATES:** Objections must be received by [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN FEDERAL REGISTER].

**ADDRESSES:** Submit your objections, identified by Docket Number OAR-2009-0430 by one of the following methods:

A. Federal Rulemaking Portal:

<http://www.regulations.gov>. This NODA is not a rulemaking, but you may use the Federal Rulemaking Portal to submit objections to the NODA. To submit objections, follow the on-line instructions for submitting comments.

B. Mail: Air Docket, ATTN: Docket Number OAR-2009-0430, Environmental Protection Agency, Mail Code: 6102T, 1200 Pennsylvania Ave., NW, Washington, DC 20460

C. Email: A-AND-R-Docket@epa.gov

D. Hand Delivery: EPA Docket Center, 1301 Constitution Avenue, NW, Room B102, Washington, DC. Such deliveries are

only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

**INSTRUCTIONS:** Direct your objections to Docket ID No. OAR-2009-0430. EPA's policy is that all objections received will be included in the public docket without change and may be made available online at <http://www.epa.gov/edocket>, including any personal information provided, unless the objection includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through [www.regulations.gov](http://www.regulations.gov) or email. The [www.regulations.gov](http://www.regulations.gov) website is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your objection. If you send an email objection directly to EPA without going through [www.regulations.gov](http://www.regulations.gov), your email address will be automatically captured and included as part of the objection that is placed in the public docket and made available on the Internet. If you submit an electronic objection, EPA recommends that you include your name and other contact information in the body of your

objection and with any disk or CD-ROM you submit. If EPA is unable to read your objection and contact you for clarification due to technical difficulties, EPA may not be able to consider your objection. Electronic files should avoid the use of special characters and any form of encryption and should be free of any defects or viruses.

**DOCKET:** All documents in the docket are listed in the [www.regulations.gov](http://www.regulations.gov) index. Although listed in the index, some information is not publicly available, i.e., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in [www.regulations.gov](http://www.regulations.gov) or in hard copy at the EPA Docket Center, EPA West, Room B102, 1301 Constitution Avenue, NW, Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m, Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566-1744, and the telephone number for the Air Docket is (202) 566-1742.

**For Further Information Contact:** Questions concerning this action should be addressed to Robert L. Miller, EPA



Headquarters, CAMD (6204J), 1200 Pennsylvania Ave., NW, Washington, DC 20460, telephone (202) 343-9077, and email miller.robertl@epa.gov. If mailing by courier, address package to Robert L. Miller, 1310 L St., NW, Room 254B, Washington, DC 20005.

**SUPPLEMENTARY INFORMATION:**

**Outline:**

1. General Information.
2. What is the Purpose of this NODA?
3. What are the Requirements for Requesting and Receiving CAIR CSP Allowances and the Procedures for Allocating Such Allowances?
4. How is EPA Applying to Individual CAIR Units the Requirements for Requesting and Receiving CAIR CSP Allowance Allocations?
5. How do I Interpret the Data Made Available by this NODA?

**1 General Information**

EPA published the Clean Air Interstate Rule (CAIR) on May 12, 2005 (70 Fed. Reg. 25162 (May 12, 2005)), in which EPA determined that 28 States and the District of Columbia contribute significantly to nonattainment and interfere with maintenance of the national ambient air quality standards (NAAQS) for fine particles (PM<sub>2.5</sub>) and/or 8-hour ozone in downwind States in the eastern half of the country. As a result, EPA required those upwind States to revise their state implementation plans (SIPs) to include

control measures that reduce emissions of sulfur dioxide ( $\text{SO}_2$ ), which is a precursor to  $\text{PM}_{2.5}$ , and/or nitrogen oxides ( $\text{NO}_x$ ), which is a precursor to both ozone and  $\text{PM}_{2.5}$ . Under CAIR, States may implement these reduction requirements by participating in EPA-administered CAIR  $\text{SO}_2$ ,  $\text{NO}_x$  annual, and  $\text{NO}_x$  ozone season trading programs or by adopting any other control measures.

On April 28, 2006, EPA promulgated FIPs for all States covered by CAIR in order to ensure the emissions reductions required by CAIR are achieved on schedule (71 Fed. Reg. 25328 (Apr. 28, 2006)). The CAIR FIPs require electric generating units (EGUs) to participate in EPA-administered CAIR  $\text{SO}_2$ ,  $\text{NO}_x$  annual, and  $\text{NO}_x$  ozone season trading programs, as appropriate. These trading programs impose essentially the same requirements as, and are integrated with, the respective CAIR SIP trading programs. Further, as provided in a rule published by EPA on November 2, 2007, a State's CAIR FIPs are automatically withdrawn when EPA approves a SIP revision, in its entirety and without any conditions, as fully meeting the requirements of CAIR. Where only portions of the SIP revision are approved, the corresponding portions of the FIPs are automatically withdrawn and the remaining portions of the FIP stay in

place. Finally, the CAIR FIPs also allow States to submit abbreviated SIP revisions that, if approved by EPA, will automatically replace or supplement certain CAIR FIP provisions (e.g., the methodology for allocating NO<sub>x</sub> allowances to sources in the State), while the CAIR FIP remains in place for all other provisions. As a result of EPA's approval of some States' CAIR-related SIP or abbreviated SIP provisions, EPA is administering the CAIR CSP provisions in the CAIR NO<sub>x</sub> annual trading program only for the States of Delaware, Louisiana, Maryland, Pennsylvania, and Wisconsin, and the remaining States are responsible for administering the CAIR CSP for their respective CAIR units.

EPA was sued by a number of parties on various aspects of CAIR, and on July 11, 2008, the U.S. Court of Appeals for the District of Columbia Circuit issued its decision to vacate and remand both CAIR and the associated CAIR FIPs in their entirety. North Carolina v. EPA, 531 F.3d 836 (D.C. Cir. Jul. 11, 2008). However, in response to EPA's petition for rehearing, the Court issued an order remanding CAIR to EPA without vacating either CAIR or the CAIR FIPs. North Carolina v. EPA, 550 F.3d 1176 (D.C. Cir. Dec. 23, 2008). The Court thereby left CAIR in place in order to

"temporarily preserve the environmental values covered by CAIR" until EPA replaces it with a rule consistent with the Court's opinion. Id. at 1178. The Court directed EPA to "remedy CAIR's flaws" consistent with its July 11, 2008 opinion, but declined to impose a schedule on EPA for completing that action. Id.

This NODA provides data and other information concerning the allocation of CAIR CSP allowances under §97.143 of the CAIR FIPs for CAIR units in Delaware, Louisiana, Maryland, Pennsylvania, and Wisconsin. That rule requires that the Administrator determine by order the CAIR CSP allowance allocations and provide an opportunity for the public to submit objections.

***Does this Action Apply to Me?***

This NODA applies to CAIR units in the States of Delaware, Louisiana, Maryland, Pennsylvania, and Wisconsin whose owners and operators requested on or before May 1, 2009 a CAIR CSP allowance allocation. If you have any questions regarding the applicability of this NODA to a particular entity, consult the person listed in the preceding section under "for further information contact."

***What Should I Consider as I Prepare and Submit any Objections for EPA?***



When preparing and submitting objections, remember to:

(1) Identify the NODA by docket number and other identifying information (subject heading, Federal Register date and page number).

(2) Follow directions. EPA may ask you to respond to specific questions or organize objections in a specific manner.

(3) Make sure to submit your objections by the deadline identified.

To expedite EPA's review, you are encouraged to send a separate copy of your objections, in addition to the copy you submit to the official docket, to Robert L. Miller, EPA Headquarters, CAMD (6204J), 1200 Pennsylvania Ave., NW, Washington, DC 20460 and email [miller.robertl@epa.gov](mailto:miller.robertl@epa.gov). If you email the copy of your objections to Mr. Miller, put "objection for Docket Number OAR-2009-0430" in the subject line to alert Mr. Miller that an objection is included. If mailing by courier, address package to Robert L. Miller, 1310 L St., NW, Room 254B, Washington, DC 20005.

Do not submit CBI to EPA through [www.regulations.gov](http://www.regulations.gov) or email. Clearly mark any portion of the information that you claim to be CBI. For CBI in a disk or CD ROM that you mail to EPA, mark the outside of the disk or CD ROM as CBI

and then identify electronically within the disk or CD ROM the specific information that is claimed as CBI. In addition to one complete version of the objection that includes information claimed as CBI, a copy of the objection that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2. Send or deliver information identified as CBI only to the following address: Robert L. Miller, EPA Headquarters, CAMD (6204J), 1200 Pennsylvania Avenue, NW, Washington DC 20460.

## **2 What the Purpose of This NODA?**

In this NODA, EPA is making available under the CAIR FIPs for Delaware, Louisiana, Maryland, Pennsylvania, and Wisconsin the following data and other information: (1) the list of each CAIR unit in these States for which the owners and operators requested, and that qualifies or does not qualify for, allocation of CAIR CSP allowances, (2) the data for each such unit from quarterly emission reports submitted under EPA's monitoring, reporting, and recordkeeping rules applicable to trading programs (i.e., 40 CFR part 75) by the owners and operators, and EPA's

interpretations of §97.143, on which are based the determination of each unit's qualification or failure to qualify for a CAIR CSP allowance allocation and the calculation of the amount of CAIR CSP allowances that each qualifying unit receives, (3) the calculation, and resulting amount, of the CAIR CSP allowance allocations for each qualifying unit; and (4) the basis for each allocation or denial, in whole or in part, of an allocation for each unit.

The purpose of making the data available for objection is to ensure that the data on which the applicable determinations for each unit are based are correct. EPA is providing unit owners, unit operators, and the public an opportunity to make objections to any of the data made available in this NODA. Any person objecting to any of the data should explain the basis for his or her objection, should provide alternative data and supporting documentation, and explain why the alternative data are the best available data. Supporting documentation can include, but is not limited to, spreadsheets, explanations of why the data on such spreadsheets are more accurate, and information on the data source. In general, EPA does not anticipate revising a unit's NO<sub>x</sub> emission rate and heat

input data reported to EPA in quarterly emissions reports in accordance with part 75 because, in submitting the reports, the designated representative of the unit's owners and operators certified the data's correctness, completeness, and consistency with part 75 requirements. However, EPA will consider any objections to the data.

The provisions of §97.143 -- which govern the submission of requests for CAIR CSP allowance allocations and set forth the criteria for qualification for, and the methodologies for calculating, such allocations for each individual unit -- are final and are not being reopened in this NODA. These provisions are described in this NODA solely for informational purposes and are not open for objection. However, EPA's interpretation of these rule provisions in applying them to each unit requesting a CAIR CSP allowance allocation, and EPA's reasons for allocating such allowances or denying such allocations are open for objection, subject to the above-described limitation that the provisions of §97.143 themselves are not a proper subject of objection. See 40 CFR 97.143(d)(4) (explaining that objections must be limited to whether EPA's determination of each unit's CAIR CSP allowance allocations are in accordance with §97.143(b), (c), and (d)(2) and (3)).



3     What are the Requirements for Requesting and Receiving CAIR CSP Allowances and the Procedures for Allocating Such Allowances?

In the final CAIR FIPs, EPA adopted the CAIR NO<sub>x</sub> Annual Trading Program as part of the federal remedy for CAIR. The CAIR FIPs established, for each State subject to CAIR with respect to annual NO<sub>x</sub> emissions, an amount of CAIR NO<sub>x</sub> allowances -- comprising the amounts in the State NO<sub>x</sub> annual budget and the State's share of the CAIR CSP -- that EPA allocates to CAIR units in the State. As explained in the preamble of the CAIR FIPs (71 Fed. Reg. at 25361-62), the CAIR CSP was established to provide allowances to units subject to the CAIR NO<sub>x</sub> Annual Trading Program to incentivize early, annual NO<sub>x</sub> emissions reductions and to prevent undue risk to the reliability of electricity supply due to compliance with 2009 CAIR NO<sub>x</sub> annual emissions limitation. The CAIR CSP comprises 200,000 vintage 2009 CAIR NO<sub>x</sub> allowances for the entire CAIR region, apportioned to each State. EPA is administering the allocation of the portions of the CAIR CSP for Delaware, Louisiana, Maryland, Pennsylvania, and Wisconsin,<sup>1</sup> which are 843 allowances for

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<sup>1</sup> As noted above, the remaining States covered by CAIR or the CAIR FIPs are administering the allocation of their

Delaware, 2,251 allowances for Louisiana, 4,670 allowances for Maryland, 16,009 allowances for Pennsylvania, and 4,898 allowances for Wisconsin. Under §97.143(b) and (c), the owners and operators of any unit for which CAIR CSP allowances were sought had to submit to EPA a request for CAIR CSP allowance allocations by May 1, 2009. The owners and operators of a CAIR unit in these States could request a CAIR CSP allowance allocation if (1) the unit made early NO<sub>x</sub> reductions in 2007 or 2008 (§97.143(b)) or (2) if the owners and operators demonstrated that compliance with the CAIR NO<sub>x</sub> emissions limitation for 2009 would create an undue risk to the reliability of the electricity supply during 2009 (§97.143(c)).

In §97.143(b), the CAIR FIPs provide both the specific criteria for determining whether a CAIR unit qualifies to receive a CAIR CSP allowance allocation for early NO<sub>x</sub> reductions and the methodology for determining the amount of early NO<sub>x</sub> reductions and calculating the CAIR CSP allowance allocation based on such reductions. To qualify for a CAIR CSP allowance allocation under §97.143(b), a unit must meet three criteria. First, the unit must have for each year (i.e., 2007 and/or 2008) for which the allocation

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respective portions of the CAIR CSP under their SIPs or abbreviated SIPs.

is sought, a NO<sub>x</sub> annual emission rate below 0.25 lb/mmBtu. In addition, for any unit included in an Acid Rain Program NO<sub>x</sub> averaging plan under §76.11, the weighted average annual NO<sub>x</sub> emission rate for the group of units under such averaging plan for the year for which the allocation is sought must be at or below the weighted average annual group NO<sub>x</sub> emission rate for the year preceding that year. Lastly, the unit must demonstrate that it achieved a NO<sub>x</sub> emission reduction in each year for which the allocation is sought.

As EPA explained in the preamble of the CAIR FIPs (71 Fed. Reg. 25361), the CSP under the CAIR FIP is modeled on the CSP in §96.143 of the CAIR model trading rules. The preamble of the CAIR model trading rules in turn explained that the CSP in the CAIR model trading rules was:

patterned after the NO<sub>x</sub> SIP Call's CSP . . .

Similarities include: Limiting the total number of allowances that can be distributed; limiting the years in which CSP allowances can be earned; populating the CSP with allowances vintaged the first compliance year; and using distribution criteria of early reductions and need. 70 Fed. Reg. 25162, 25286 (May 12, 2005).

Under the NO<sub>x</sub> SIP Call, as originally promulgated by EPA, May 1, 2003 was the commencement date, and 2003 was the first compliance year, of the NO<sub>x</sub> Budget Trading Program, which covered ozone season (i.e., May 1-September 30) NO<sub>x</sub> emissions, rather than annual NO<sub>x</sub> emissions. The NO<sub>x</sub> SIP Call CSP was a pool of 200,000 allowances available for each unit that "reduce[d] its NO<sub>x</sub> emission rate in the 2001 or 2002 control period [i.e., ozone season]". 40 CFR 96.55(c); see also 40 CFR 51.123(e)(4)(iii)(A)(2) (requiring verification of emissions reduction "having occurred during an ozone season between September 30, 1999 and May 1, 2003"). The unit was required to monitor NO<sub>x</sub> emissions in accordance with the NO<sub>x</sub> Budget Trading Program (generally involving the use of continuous emissions monitoring systems in accordance with part 75) starting in the 2000 control period and thereafter. In order to qualify for NO<sub>x</sub> SIP Call CSP allowances for 2001 or 2002 early reductions, the unit had to have a NO<sub>x</sub> emission rate in the respective year of less than 0.25 lb/mmBtu and less than 80% of the NO<sub>x</sub> emission rate in 2000. 40 CFR 96.55(c)(1) and (3). In short, the requirement that early reductions occurred in 2001 or 2002 meant that the unit had to have an emission rate in 2001 or 2002 respectively that



was less than that unit's emission rate in the year preceding the required period (2001-2002) for the early reductions, i.e., 2000. See 63 Fed. Reg. 57414 (explaining that monitored emissions data "from the 2000 ozone season shall be used to establish a baseline emission rate" that the unit's emission rate in 2001 or 2002 must be at least 20% below). The NO<sub>x</sub> SIP Call CSP was also available for sources for which compliance in 2003 would create "undue risk for the reliability of the electricity supply" (40 CFR 51.121(e)(4)(iii)(B)(2)(i)) or comparable undue risk for a non-electric generating source or its associated industry (40 CFR 51.121(e)(4)(iii)(B)(2)(ii)).

The requirements for qualifying for the CAIR CSP -- which, as discussed above, was patterned after the NO<sub>x</sub> SIP Call CSP -- are structured in a similar way to the NO<sub>x</sub> SIP Call CSP qualification requirements. In particular, the first year for compliance under the CAIR NO<sub>x</sub> Annual Trading Program is 2009, and, in order to qualify for the CAIR CSP for early reductions, a unit must "achieve[ ] emissions reductions in 2007 and 2008". 40 CFR 97.143(b); see also 40 CFR 51.123(e)(4)(iii)(A)(2) (stating that emission reductions must "have occurred during 2007 and 2008") and 40 CFR 96.143(b) (CAIR model trading rule provision

requiring emission reductions "achieve[d] in 2007 and 2008"). Consistent with the approach adopted for determining qualification for the NO<sub>x</sub> SIP Call CSP, EPA interprets the CAIR CSP qualification requirement for early reductions to mean that the unit must have an emission rate in 2007 or 2008 that is less than the unit's emission rate in the year before 2007-2008, i.e., 2006. In short, the unit's emission rate in 2006 is used to establish the baseline emission rate for determining whether the unit reduced its emission rate in 2007 or 2008. Thus, in order to qualify for allocations from the CSP under the CAIR FIPs, a unit must -- in addition to meeting in 2007 or 2008 the above-described requirements concerning the 0.25 lb/mmBtu ceiling on the annual NO<sub>x</sub> emission rate and the weighted average group NO<sub>x</sub> emission rate in any NO<sub>x</sub> averaging plan covering the unit -- have an annual NO<sub>x</sub> emission rate in 2007 or 2008 below the unit's 2006 annual NO<sub>x</sub> emission rate.

Once EPA determines which individual units in a given State meet these qualification requirements for receiving a CAIR CSP allowance allocation under §97.143(b) for 2007 and/or 2008, EPA then determines the amount of such allocation for each qualifying unit for each of the

applicable years. EPA calculates such allocation by: multiplying the difference between 0.25 lb/mmBtu and the unit's annual NO<sub>x</sub> emission rate (rounded to the nearest hundredth) for such year by the annual heat input (in mmBtu) of the unit for such year; dividing the results by 2,000 lb/ton; and rounding to the nearest whole number of tons as appropriate.

The CAIR FIPs, like the NO<sub>x</sub> SIP Call, provide a second means of qualifying for CSP allowance allocations. Specifically, in §97.143(c), the CAIR FIPs set forth specific criteria that a CAIR unit must meet in order to qualify for a CAIR CSP allowance allocation in order to prevent the unit's compliance for 2009 with CAIR NO<sub>x</sub> emission limitation under the CAIR NO<sub>x</sub> Annual Trading Program (i.e., the requirement to hold CAIR NO<sub>x</sub> allowances covering annual NO<sub>x</sub> emissions) from creating undue risk to the reliability of the electricity supply. A request for CAIR CSP allowances under that provision must demonstrate that, without the requested allowances, compliance for 2009 will result in such undue risk. That demonstration must include a showing that it would not be feasible for the unit's owners and operators to obtain sufficient electricity from other electricity generators during the

installation of emission control technology at the unit for compliance, or to obtain sufficient allowances, to avoid undue risk. If EPA determines that any individual units qualify for CAIR CSP allowances under the electric reliability criterion, EPA then determines the minimum amount of CAIR CSP allowance that each such unit needs to prevent undue risk. See 40 CFR 97.143(c)(1) (requiring request be for "minimum amount" of allowances necessary to remove undue risk) and 97.143(d)(1) (requiring EPA to adjust requests as necessary to make the requested amounts comply with the requirements of §97.143(b) and (c)).

Finally, EPA makes any necessary adjustments under §97.143(d)(2) and (3) to the CAIR CSP allocations calculated under §97.143(b) and (c) in order to ensure that the total amount of CAIR CSP allowances allocated to units in a given State does not exceed that State's share of the CAIR CSP. If the sum of all of the calculated allocations for units in a given State is less than that State's portion of the CAIR CSP, then such units are allocated the full calculated amount. If the sum of all of the calculated allocations for units in a given State is greater than that State's portion of the CAIR CSP, then each unit is allocated its proportionate share, i.e., the calculated amount multiplied



by the State's CAIR CSP portion divided by the sum of the calculated amounts for all units in that State.

Under §97.143(d)(4), by July 31, 2009, EPA must determine by order the CAIR CSP allowance allocations in accordance with §97.143(d)(1) through (3) and:

make available to the public each determination of. . . [CAIR CSP allowance allocations] and will provide an opportunity of submission of objections to the determination. Objections shall be limited to addressing whether the determination is in accordance with [§97.143(b), (c), and (d)(2) and (3)], as appropriate. Based on any such objections [EPA] will adjust each determination to the extent necessary to ensure that it is in accordance with such [rule provisions]. 40 CFR 97.143(d)(4).

In this NODA, EPA is carrying out its responsibilities under §97.143(d)(4).

#### **4 How is EPA Applying to Individual CAIR Units the Requirements for Requesting and Receiving CAIR CSP Allowance Allocations?**

On March 18, 2009, EPA sent an email -- to the designated representatives, alternate designated representatives, and their respective agents under the CAIR NO<sub>x</sub> allowance tracking system for CAIR units in Delaware, Louisiana, Pennsylvania, and Wisconsin -- that provided instructions on the proper submission of a CAIR CSP

allowance allocation request.<sup>2</sup> The March 18, 2009 email explained what data should be submitted with the request, depending on whether the request was made pursuant to §97.143(b) or (c) and reminded addressees of the May 1, 2009 deadline for such requests. Among the data elements for a request under §97.143(b) were: the annual NO<sub>x</sub> rate of the unit for years 2006, 2007, and 2008; the annual heat input for years 2007 and 2008; data demonstrating that the unit made NO<sub>x</sub> reductions in 2007 or 2008; and the calculations showing the number of allowances that the unit was entitled to receive under §97.143(b)(2). Among the data elements for a request under §97.143(c) were: the calculation of the minimum amount of allowances necessary to remove undue risk to electricity supply reliability and a demonstration that the owners and operators of the unit involved could not obtain sufficient electricity from other electricity generators, or sufficient allowances, to prevent such undue risk. Because most CAIR units have also been affected units under the Acid Rain Program since at least 2000, EPA already had access, through quarterly emissions reports

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<sup>2</sup> On April 28, 2009, Maryland sent essentially the same email to the designated representatives, alternate designated representatives, and their respective agents under the CAIR NO<sub>x</sub> allowance tracking system for CAIR units in Maryland.

submitted by the unit's owners and operators in accordance with part 75 for 2006 through 2008, to the emissions and other data needed to determine whether most of the units qualified for CAIR CSP allowance allocations based on early reductions and, if so, for how many allowances.

Nevertheless, EPA requested from owners and operators the data elements set forth in the March 18, 2009 email in order to ensure that there were no data errors and that the owners and operators would know the maximum number of CAIR CSP allowances the unit could expect to receive. In contrast to the information necessary to allocate CAIR CSP allowances for early reductions, the information necessary to allocate such allowances to prevent undue risk to electricity supply reliability had not previously been collected by EPA and, on its face, would reflect a unit owners' and operators' unique circumstances concerning the electricity supply available to them and their customers and the owners' and operators' access to allowances. EPA therefore required that the owners and operators provide this information as part of any request for CAIR CSP allowances to prevent undue risk to electricity supply reliability.



EPA received timely requests for CAIR CSP allowance allocations for 2007 and 2008 for about 60 CAIR units in Delaware, Louisiana, Maryland, Pennsylvania, and Wisconsin.<sup>3</sup> Many of the CAIR CSP allowance allocation requests expressly stated that the owners and operators were seeking allowances pursuant to §97.143(b). However, some requests did not identify the provision under which CAIR CSP allowances were being sought, but provided data that were only relevant to qualification for such allowances under §97.143(b). Moreover, while many of the requests provided all of the data needed, and referenced in the March 18, 2009 e-mail, for determining qualification for allowances under §97.143(b), some provided only a portion of such data or provided incorrect data. Some requests either overstated or understated the amount of allowances the unit involved was qualified to receive. In many cases, those requests were based on emissions data that differed from the EPA-accepted emissions values in the quarterly emission reports submitted and certified by the designated representatives of the owners and operators of the units in

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<sup>3</sup> EPA also received requests for units in Minnesota. Because EPA recently proposed to stay the effectiveness of CAIR and the CAIR FIPs to Minnesota and sources in that State, EPA is not addressing here any requests concerning Minnesota.



under part 75, and no explanation or justification supporting the use of the values not certified under part 75 was provided. Consistent with the requirements of §97.143(b) to use data provided in accordance with part 75 and because the quarterly emissions report values had previously been certified as correct, complete, and consistent with the requirements (such as those for quality assurance) of part 75, EPA maintains that the such data are the correct data to use for purposes of allocating CAIR CSP allowances. See 40 CFR 97.143(b)(1) (requiring a unit to monitor and report NO<sub>x</sub> emissions during 2007-2008 in accordance with subpart HH of the CAIR FIP NO<sub>x</sub> annual trading program rules, which is based on, and references, 40 CFR part 75); and 40 CFR 75.64(c) (requiring certification statement in quarterly emissions reports). In other cases, the requests reflected a misunderstanding, or misapplication, of the CAIR CSP allocation methodology (which is summarized above) in §97.143(b). None of the requests specifically referenced §97.143(c) or provided the information needed, and referenced in the March 18, 2009 e-mail, for determining qualification for allowances under that provision. Finally, in the case of one company's units, the request did not reference either §97.143(b) or

§97.143(c) as the basis for receiving CAIR CSP allowances and instead requested such allowances on other grounds.

Rather than denying any request that did not provide all the necessary data, provided incorrect data, miscalculated the amount of allowances for which the unit qualified, or failed to state expressly that the request was being made under §97.143(b) or §97.143(c), EPA has decided to evaluate each unit for which a timely request for CAIR CSP allowances on any grounds was submitted, determine if that unit qualifies for allowances for early reductions under §97.143(b), and, if so, determine the maximum amount of allowances that the unit can receive under that provision. EPA is taking this approach because, for the reasons discussed above, EPA already has the necessary data to make such determinations for every unit for which a timely request was submitted and therefore requesting owners and operators to amend or correct their requests would unnecessarily delay completion of the CAIR CSP allowance allocations.

However, with regard to CAIR CSP allowance allocations to prevent undue risk to electricity supply reliability under §97.143(c), EPA does not have the information necessary to support a request for allowances

under that provision. As discussed above, this information is not already available to EPA and involves circumstances unique to the particular owners and operators involved. Consequently, EPA is taking the approach of considering a unit's qualification for CAIR CSP allowances under §97.143(c) only if the owners and operators of the unit expressly request allowances under that provision. Because none of the requests received by EPA referenced §97.143(c) as a basis for the unit involved obtaining CAIR CSP allowances, much less provided the necessary information to demonstrate qualification for such allowances under that provision, EPA has determined that no CAIR CSP allowances are being allocated under the provision.

Applying the approaches discussed above, EPA evaluated each individual unit for which the owners and operators submitted a request for a CAIR CSP allowance allocation and determined whether the unit qualified under §97.143(b) for such allowances and, if so, calculated the maximum amount for which the unit qualified, reflecting any adjustment necessary to ensure that the total amount of such allowances allocated to the units in a given State would not exceed that State's portion of the CAIR CSP. The detailed unit-by-unit data, determinations, and



calculations are set forth in a technical support document, which is a a single Excel spreadsheet titled "CAIR FIP CSP Allocations Data" and is available on EPA's CAMD website at <http://www.epa.gov/airmarkets/cair/csp> and in the CAIR CSP Docket (Docket ID No. OAR-2009-0430). The unit-by-unit allocations and denials of allocations that are shown in the technical support document are summarized below:

For 2007:

1. Each individual unit whose 2007 annual NO<sub>x</sub> emission rate reported in accordance with part 75 was less than 0.25 lb/mmBtu and less than the unit's 2006 annual NO<sub>x</sub> emission rate reported in accordance with part 75 and whose NO<sub>x</sub> averaging plan (if any) had a weighted average group NO<sub>x</sub> emission rate for 2007 determined in accordance with part 75 that did not exceed the plan's weighted average group NO<sub>x</sub> emission rate for 2006 reported in accordance with part 75 is allocated CAIR CSP allowances calculated in accordance with §97.143(b) and (d). To the extent the amount allocated is less than the amount requested for the unit, EPA is denying, in part, the request, as well as providing an allocation. In virtually all cases, the basis for such denials is that the request was based on data not certified under part 75 for which no supporting explanation or



justification was provided or an interpretation of §97.143(b) and (d) that was inconsistent with the rule text or EPA's interpretation (set forth in this NODA) of the rule text.

2. Each individual unit whose 2007 annual NO<sub>x</sub> emission rate reported in accordance with part 75 exceeded 0.25 lb/mmBtu or exceeded the unit's 2006 annual NO<sub>x</sub> emission rate reported in accordance with part 75 or whose NO<sub>x</sub> averaging plan (if any) had a weighted average group NO<sub>x</sub> emission rate for 2007 determined in accordance with part 75 exceeded the plan's weighted average group NO<sub>x</sub> emission rate for 2006 determined in accordance with part 75 is not allocated any CAIR CSP allowances. For each of these units, EPA is denying in full the requested allocation.

For 2008:

3. Each individual unit whose 2008 annual NO<sub>x</sub> emission rate reported in accordance with part 75 was less than 0.25 lb/mmBtu and less than the unit's 2006 annual NO<sub>x</sub> emission rate reported in accordance with part 75 and whose NO<sub>x</sub> averaging plan (if any) had a weighted average group NO<sub>x</sub> emission rate for 2008 determined in accordance with part 75 that did not exceed the plan's weighted average group NO<sub>x</sub> emission rate for 2007 reported in accordance with part 75

is allocated CAIR CSP allowances calculated in accordance with §97.143(b) and (d). To the extent the amount allocated is less than the amount requested for the unit, EPA is denying, in part, the request, as well as providing an allocation. In virtually all cases, the basis for such denials is that the request was based on data not certified under part 75 for which no supporting explanation or justification was provided or an interpretation of §97.143(b) and (d) that was inconsistent with the rule text or EPA's interpretation (set forth in this NODA) of the rule text.

4. Each individual unit whose 2008 annual NO<sub>x</sub> emission rate reported in accordance with part 75 exceeded 0.25 lb/mmBtu or exceeded the unit's 2006 annual NO<sub>x</sub> emission rate reported in accordance with part 75 or whose NO<sub>x</sub> averaging plan (if any) had a weighted average group NO<sub>x</sub> emission rate for 2008 determined in accordance with part 75 exceeded the plan's weighted average group NO<sub>x</sub> emission rate for 2007 determined in accordance with part 75 is not allocated any CAIR CSP allowances. For each of these units, EPA is denying in full the requested allocation.

For 2007 and 2008:

5. In addition to the basis stated in paragraphs 1 through 4 above, for allocating and for denying in full or in part a request for CAIR CSP allowance allocations, there is an additional basis for denying in full or in part the allocations for individual units covered by one request for such allocations. In that request, a company requested that each of its units in Louisiana be given a certain amount of CAIR CSP allowances (exceeding the amount allocated for the unit by EPA in this NODA) on the ground that these units were underallocated CAIR NO<sub>x</sub> allowances and CAIR NO<sub>x</sub> ozone season allowances. As noted by the company, EPA took the approach in CAIR of establishing State NO<sub>x</sub> annual and NO<sub>x</sub> ozone season budgets using, inter alia, the heat input for units in the State and fuel factors that gave the greatest weight to heat input from coal, less weight to heat input from oil, and the least weight to heat input from natural gas. On appeal the U.S. Court of Appeals for the District of Columbia determined that "EPA's approach contravenes section 110(a)(2)(D)(i)(I)" (North Carolina, 531 F.3d at 921 and that "the resulting state budgets were arbitrary and capricious" (id.)). Subsequently, the Court remanded CAIR, without vacatur, on this and several other issues "so that EPA may remedy



CAIR's flaws." North Carolina, 550 F.3d at 1178.

According to the company, revising the State budgets and State allowance allocation methodologies to eliminate the use of the fuel factors would result in the company's units in Louisiana being allocated a total of 10,764 more CAIR NO<sub>x</sub> annual allowances and 4,913 more CAIR NO<sub>x</sub> ozone season allowances in 2009 under the CAIR trading programs.

Entergy's April 30, 2009 Compliance Supplement Pool CAIR NO<sub>x</sub> Allowance Request at 1. In its April 30, 2009 request for CAIR CSP allowance allocations, the company requested that its units in Louisiana therefore be allocated "from the Compliance Supplement Pool" 10,764 CAIR NO<sub>x</sub> annual allowances and 4,913 CAIR NO<sub>x</sub> ozone season allowances.<sup>4</sup>

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<sup>4</sup> The company subsequently revised its calculations of additional amounts of CAIR allowances its units would be allocated as a result of eliminating the use of the fuel factors. These revisions resulted in turn in revisions of the amount of CAIR CSP allowances the company requested. See Entergy's July 13, 2009 Compliance Supplement Pool CAIR NO<sub>x</sub> Allowance Request by Entergy companies (supplementing the company's April 30, 2009 request). The company also noted that the CAIR CSP does not include any CAIR NO<sub>x</sub> ozone season allowances. The company indicated that EPA should allocate additional CAIR NO<sub>x</sub> allowances (apparently from the CAIR CSP) equal to the amount or the value of the CAIR NO<sub>x</sub> ozone season allowances requested by the company. See Entergy's July 13, 2009 Compliance Supplement Pool CAIR NO<sub>x</sub> Allowance Request by Entergy companies (supplementing the company's April 30, 2009 request). None of these changes in the amounts of CAIR CSP allowances requested by the company change the amounts of the CAIR CSP allowances allocated by EPA for the company's individual units in



Entergy's April 30, 2009 Compliance Supplement Pool CAIR NOx Allowance Request at 1.

In this request, the company did not reference §97.143(b) or (c) or claim that its units should be given CAIR CSP allowances under those provisions and provided only some of the information necessary to apply §97.143(b) and none of the information necessary to apply §97.143(c).<sup>5</sup> In essence, the company requested that EPA allocate CAIR CSP allowances on grounds that §97.143 does not allow to be used for making such allocations. Nevertheless, for reasons discussed above, EPA evaluated whether the company's units in Louisiana qualify for CAIR CSP allowance allocations under grounds provided for in §97.143. Specifically, for the reasons discussed above, EPA is determining in this NODA that the units can be allocated CAIR CSP allowances to the extent the units qualify for allocations for early reductions under §97.143(b). However,

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Louisiana or affect the basis for EPA's allocations and denials of allocations discussed in this NODA.

<sup>5</sup> The company's vague statement that it "believes that allowances may be in short supply at the end of 2009" and so the company should receive CAIR CSP allowances to "help ensure there is no disruption of service" (Entergy's July 7, 2009 Compliance Supplement Pool CAIR NOx Allowance Request by Entergy Companies at 1 (supplementing the company's April 30, 2009 request)) does not provide any of the detailed information required in §97.143(c)(1) and (2) and is entirely unsupported.

the amounts determined by EPA for the company's individual units are less than the amounts requested by the company, and, to the extent of the differences between these amounts for each individual unit, EPA is denying in whole (with regard to units for which EPA is allocating no CAIR CSP allowances) or in part (with regard to units for which EPA is allocating some CAIR CSP allowances) the company's request. In order to allocate the full, requested amount of CAIR CSP allowances for any of the individual units covered by the company's request, EPA would have to ignore, and contravene, the requirements of the rule (§97.143) governing the qualification of a unit for CAIR CSP allowance allocations and the calculation of the amount of such allocations. For these reasons, EPA denies in whole or in part (as applicable) the company's request for CAIR CSP allowance allocations for each of the company's units in Louisiana.

**5     How do I Interpret the Data Made Available by this NODA?**

As discussed above, the detailed unit-by-unit data, determinations, and calculations with respect to CAIR CSP allowance allocations and denials of allocations are contained in a technical support document, which is a

single Excel spreadsheet titled "CAIR FIP CSP Allocations Data".

The Excel spreadsheet is divided into 4 worksheets. For each year 2007 and 2008, there are two worksheets: one addressing "allocations" of CAIR CSP allowances, i.e., the allocations for all individual units receiving some allowances, whether the amount is less than,<sup>6</sup> equals, or exceeds the amount requested; and the other addressing "denials of allocations" of CAIR CSP allowances, i.e., the denials for all individual units receiving no allowances and so whose request is denied in full. The CAIR CSP allocation and denial worksheets include: the relevant data from units' quarterly emissions reports; column notes providing the basis for allocations and denials of allocations under §97.143(b) and (d); and notes at the bottom explaining any adjustment, under §97.143(d), of each individual unit's CAIR CSP allowance allocation to ensure that the total amount of CAIR CSP allowance allocations do not exceed the relevant State's portion of the CAIR CSP. The basis, provided in the technical support document, for each allocation and each denial (in full or in part) of

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<sup>6</sup> The requests of these units are being denied in part.

allocations is summarized and supplemented in section 4 of  
this NODA.

7/31/09  
Dated

  
Brian McLean

Director

Office of Atmospheric Programs